

ESTATE OF CLARA SELTICE SHERWOOD	:	Order Vacating and Remanding April 4,
Deceased Coeur D'Alene 181-229	:	1985, Order Determining Heirs in
Probate No. IP PO 65L 85-77	:	Probate No. IP PO 65L 85-77
	:	
	:	Order Reopening Probate No. D-24-69
ESTATE OF ANNIE EULOPSEN (BIG TOM)	:	
BIG SMOKE SHERWOOD	:	Docket No. IBIA 85-46
Deceased Flathead Allottee 2702	:	
Probate No. D-24-69	:	August 20, 1986

This is an appeal from the July 11, 1985, order denying rehearing issued by Administrative Law Judge Robert C. Snashall in Indian probate proceeding IP PO 65L 85-77. That order affirmed Judge Snashall's order determining heirs of April 4, 1985, which did not include Fred Sherwood (appellant) as an heir of Clara Seltice Sherwood (decendent). Appellant alleges that he is the surviving spouse of decendent. He challenges Judge Snashall's finding that the marriage between decendent and appellant was terminated by Indian custom divorce.

The record shows that decendent and appellant were married in a civil ceremony on July 23, 1936, and in a church ceremony on July 25, 1939. In his order denying rehearing, Judge Snashall noted a question as to the validity of the 1936 marriage because the license was issued in Idaho and the ceremony took place in Washington. The 1939 ceremony also took place in Washington. There is no evidence in the record that a license was obtained for the 1939 marriage. Since both marriages were solemnized in Washington, the law of Washington controls as to their validity. Estate of Richard Doyle Two Bulls, 11 IBIA 77 (1983); 52 Am. Jur. 2d Marriage § 80 (1970); 55 C.J.S. Marriage §4 (1948). Under Washington court decisions, the absence of, or defect in, a marriage license does not invalidate a marriage which has been solemnized. In re Hollopeter, 52 Wash. 41, 100 P. 159 (1909); Weatherall v. Weatherall, 63 Wash. 526, 115 P. 1078 (1911). See also Annot., 61 ALR 2d 847 (1958) with respect to the general rule that a marriage solemnized without a license or pursuant to a defective or improperly obtained license is valid in the absence of a statutory provision nullifying the marriage for noncompliance with the licensing provisions. The Board finds that, under Washington law, the marriage of decendent and appellant was valid.

There is evidence in the record tending to show that decendent and appellant separated in 1940, although the record does not clearly establish 1940 as the year of separation. The record further shows that decendent married Tom Mowitchman on November 7, 1960, and that appellant married Annie Eulopsen (Big Tom) Big Smoke Sherwood on February 10, 1954.

Annie Sherwood died intestate on October 19, 1968. At her probate hearing, appellant testified that he was Annie Sherwood's husband. In the order determining heirs issued on August 27, 1969, by Examiner of Inheritance Frances C. Elge, appellant was determined to be Annie Sherwood's surviving spouse. Pursuant to that order, appellant inherited one-third of Annie Sherwood's estate.

Appellant now states that he married Annie Sherwood under the mistaken belief that decedent had divorced him. He states that he and decedent were never divorced, and argues that Judge Snashall erred in concluding that they were divorced by Indian custom. The Board agrees that the present record lacks the proof necessary to support a conclusion that decedent and appellant were divorced by Indian custom. The requirements for such proof were discussed in Estate of Matthew Cook, 9 IBIA 52, 88 I.D. 676 (1981). One requirement is that evidence of the customs of the tribe concerned appear in the record. Another requirement is that the marriage partners be shown to have been "living in tribal relations" with a particular tribe, in a manner sufficient to vest the tribe with jurisdiction over the marriage.

Decedent was a member of the Coeur d'Alene Tribe. Appellant is a member of the Spokane Tribe. From the record here, it is not possible to tell which tribe's customs were relied upon in reaching the conclusion that there had been an Indian custom divorce or what those customs were. Under these circumstances, the Board finds that the Judge's April 4, 1985, order must be vacated and this case remanded. On remand, Judge Snashall must determine which, if either, of the two tribes' customs were applicable to the divorce of decedent and appellant. 1/ If the evidence necessary to show an Indian custom divorce is not introduced into the record, 2/ Judge Snashall must find that appellant was the surviving spouse of decedent.

If, on remand, it is determined that appellant was the surviving spouse of decedent, it must also be determined that he was not the surviving spouse of Annie Sherwood. If appellant was not the surviving spouse of Annie Sherwood, a manifest injustice occurred in the distribution of Annie Sherwood's estate. In order to allow for correction of such an error, if it is determined to have occurred, the Board orders reopened the estate of Annie Eulopsen (Big Tom) Big Smoke Sherwood, Indian probate No. D-24-69. The Board may "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." 43 CFR 4.320. The authority delegated to the Board includes the Secretary's discretionary authority

1/ At the hearing, Judge Snashall stated that the Coeur d'Alene Tribe abolished custom divorce in 1938 and the Spokane Tribe abolished custom divorce on July 1, 1940. In the order denying rehearing, he stated that decedent and appellant separated during 1940. Given the timing of these events, determination of the date of separation and of the tribe with jurisdiction, if any, is critical.

2/ Appellees Reginald Seltice and Andriana Miramontez should take note that "the burden to prove a marriage or divorce by operation of Indian custom is on the proponent of the claimed marriage or divorce." Estate of Matthew Cook, *supra*, 9 IBIA at 59, 88 I.D. at 680.

to reopen a closed Indian probate at any time under appropriate circumstances. Lane v. Mickadiet, 241 U.S. 201 (1916); Estate of Woody Albert, 14 IBIA 223 (1996); Estate of Wilma Florence First Youngman, 10 IBIA 3, 89 I.D. 291 (1982).

If he determines that the original orders in both estates were correct, Judge Snashall should issue orders setting forth that conclusion. Those orders shall be final unless appealed to the Board in accordance with 43 CFR 4.320.

If, however, he determines that appellant was the surviving spouse of decedent and therefore not the surviving spouse of Annie Sherwood, Judge Snashall shall correct the determination of heirs in both estates. In this event, the distribution of Annie Sherwood's estate must also be corrected. If he finds that it is not possible to correct the distribution of Annie Sherwood's estate through recovery of the share distributed to appellant, Judge Snashall shall recommend to the Board an order providing for correction of the error in Annie Sherwood's estate from appellant's share of decedent's estate. Such an order might provide, for instance, that appellant's share of decedent's estate would not be distributed to him until it had produced income equivalent to the value of the share of Annie Sherwood's estate which was distributed to appellant, such income to be paid to the estate of Annie Sherwood and distributed in accordance with the new determination of heirs. Judge Snashall is free to recommend another method of correcting the error in distribution of Annie Sherwood's estate.

If Judge Snashall finds that the original orders in the two estates were incorrect, the Board will allow interested parties 30 days to file exceptions, if any, to the Judge's recommended order with the Board. The Board will then enter final orders in both estates.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Administrative Judge